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4 UNITED STATES DISTRICT COURT
5 DISTRICT OF NEVADA

6 * * *

7 WELLS FARGO BANK, N.A.,

8 Plaintiff(s),

9 v.

10 LEACH JOHNSON SONG & GRUCHOW,
11 LTD., et al.,

12 Defendant(s).

Case No. 2:18-CV-723 JCM (VCF)

ORDER

13
14 Presently before the court is defendant Leach Johnson Song & Gruchow, Ltd.'s ("LJSG")
15 motion to dismiss. (ECF No. 14). Plaintiff Wells Fargo Bank, N.A. ("Wells Fargo") filed a
16 response (ECF No. 18), to which LJSG replied (ECF No. 27).

17 Also before the court is LJSG's motion for sanctions. (ECF No. 15). Wells Fargo filed a
18 response (ECF No. 22), to which LJSG replied (ECF No. 26).

19 Lastly before the court is Wells Fargo's motion for leave to conduct discovery. (ECF No.
20 20). LJSG filed a response (ECF No. 25), to which Wells Fargo replied (ECF No. 28).

21 **I. Facts**

22 The present action involves the nonjudicial foreclosure sale of a residence located at 1365
23 Via Savona, Henderson, Nevada 89052 ("the property") pursuant to NRS Chapter 116 that was
24 conducted on April 5, 2012. (ECF No. 1).

25 Non-party Firelane Series, LLC ("Firelane") purchased the property at the foreclosure
26 sale. (ECF No. 14-1). On October 12, 2012, Firelane quitclaimed the property to non-parties
27 Elena and Apolonio Gabriel (the "purchasers"). *Id.* Thereafter, the purchasers initiated a civil
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1 action for quiet title (declaratory relief) in the Eighth Judicial District Court in Nevada (“state
2 court”) against several parties, including Wells Fargo. *Id.*

3 In its answer to the state court complaint, Wells Fargo set forth fifteen affirmative
4 defenses to the purchasers’ quiet title claim and asserted three counterclaims for (1) quiet
5 title/declaratory relief; (2) “preliminary injunction”; and (3) unjust enrichment. (ECF No. 14-3).

6 On February 7, 2018, the state court issued its findings of fact and conclusions of law,
7 holding that the purchasers were entitled to quiet title in the property, and that Wells Fargo’s
8 “lien and interest in the subject property is [sic] extinguished in its entirety.” (ECF No. 14-1 at
9 9).

10 Wells Fargo initiated this action against defendants LJSG and Seven Hills Master
11 Community Association (“the HOA”) on April 20, 2018, asserting seven causes of action for: (1)
12 negligence; (2) negligence *per se*; (3) breach of contract; (4) misrepresentation; (5) breach of the
13 covenant of good faith and fair dealing; (6) wrongful/defective foreclosure; and (7) unjust
14 enrichment. *Id.*

15 **II. Legal Standard**

16 A court may dismiss a plaintiff’s complaint for “failure to state a claim upon which relief
17 can be granted.” Fed. R. Civ. P. 12(b)(6). A properly pled complaint must provide “[a] short
18 and plain statement of the claim showing that the pleader is entitled to relief.” Fed. R. Civ. P.
19 8(a)(2); *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 555 (2007). While Rule 8 does not
20 require detailed factual allegations, it demands “more than labels and conclusions” or a
21 “formulaic recitation of the elements of a cause of action.” *Ashcroft v. Iqbal*, 556 U.S. 662, 678
22 (2009) (citation omitted).

23 “Factual allegations must be enough to rise above the speculative level.” *Twombly*, 550
24 U.S. at 555. Thus, to survive a motion to dismiss, a complaint must contain sufficient factual
25 matter to “state a claim to relief that is plausible on its face.” *Iqbal*, 556 U.S. at 678 (citation
26 omitted).

27 In *Iqbal*, the Supreme Court clarified the two-step approach district courts are to apply
28 when considering motions to dismiss. First, the court must accept as true all well-pled factual

1 allegations in the complaint; however, legal conclusions are not entitled to the assumption of
2 truth. *Id.* at 678-79. Mere recitals of the elements of a cause of action, supported only by
3 conclusory statements, do not suffice. *Id.*

4 Second, the court must consider whether the factual allegations in the complaint allege a
5 plausible claim for relief. *Id.* at 679. A claim is facially plausible when plaintiff's complaint
6 alleges facts that allow the court to draw a reasonable inference that defendant is liable for the
7 alleged misconduct. *Id.* at 678.

8 Where the complaint does not permit the court to infer more than the mere possibility of
9 misconduct, the complaint has "alleged – but it has not shown – that the pleader is entitled to
10 relief." *Id.* at 679. When the allegations in a complaint have not crossed the line from
11 conceivable to plausible, plaintiff's claim must be dismissed. *Twombly*, 550 U.S. at 570.

12 The Ninth Circuit addressed post-*Iqbal* pleading standards in *Starr v. Baca*, 652 F.3d
13 1202, 1216 (9th Cir. 2011). The *Starr* court held,

14 First, to be entitled to the presumption of truth, allegations in a complaint or
15 counterclaim may not simply recite the elements of a cause of action, but must
16 contain sufficient allegations of underlying facts to give fair notice and to enable
17 the opposing party to defend itself effectively. Second, the factual allegations that
18 are taken as true must plausibly suggest an entitlement to relief, such that it is not
unfair to require the opposing party to be subjected to the expense of discovery
and continued litigation.

19 *Id.*

20 **III. Discussion**

21 The court now considers LJSG's motions to dismiss and for sanctions, as well as Wells
22 Fargo's motion for leave to conduct discovery.

23 ***a. Wells Fargo's motion for leave to conduct discovery***

24 The court will deny as moot Wells Fargo's motion for leave to conduct discovery, as
25 discovery has already commenced in this action. *See* (ECF Nos. 30, 35).

26 ***b. LJSG's motion to dismiss***

27 As a preliminary matter, negligence *per se* is not a cognizable legal claim under Nevada
28 law. "Although sometimes pled as such, negligence *per se* is not a separate cause of action, but a

1 doctrine in which the duty and breach elements of a negligence claim are assumed as a matter of
2 law.” *Insko v. Aetna Health & Life Ins. Co.*, 673 F.Supp.2d 1180, 1191 (D. Nev. 2009).
3 Accordingly, the court will dismiss Wells Fargo’s second claim for “negligence *per se*.”

4 Next, LJSJ argues in its motion to dismiss that (1) Wells Fargo’s claims are barred by
5 the doctrine of claim preclusion; and (2) Wells Fargo’s claims are time-barred by their respective
6 statutes of limitations. (ECF No. 14). Because the court finds that it can rule on LJSJ’s motion
7 based upon its statute of limitations argument, the court need not address whether Wells Fargo’s
8 claims are barred by the doctrine of claim preclusion.

9 LJSJ correctly notes that Wells Fargo’s claims accrued when the foreclosure sale took
10 place. *Id.* at 3. See *Bank of New York Mellon v. Traccia Cmty. Ass’n*, No. 2:17-cv-1802-JCM-
11 CWH, 2018 WL 1459127, at *4 (D. Nev. Mar. 23, 2018). Accordingly, taking the facts alleged
12 in Wells Fargo’s complaint as true, its claims accrued on April 5, 2012, when it alleges the
13 foreclosure sale took place. (ECF No. 1). Wells Fargo initiated the instant suit over six years
14 later, on April 20, 2018. *Id.*

15 *i. Negligence*

16 NRS 11.190(4)(e) provides that the statute of limitations for negligence claims is two
17 years. Nev. Rev. Stat. § 11.190(4)(e). Therefore, Wells Fargo’s first claim for negligence is
18 time-barred and will be dismissed.

19 *ii. Breach of contract*

20 NRS 11.190(1)(b) provides that the statute of limitations for breach of contract claims is
21 six years. Nev. Rev. Stat. § 11.190(1)(b). Wells Fargo initiated this action over six years
22 following accrual of its claims; accordingly, Wells Fargo’s claim for breach of contract is time-
23 barred and will be dismissed.

24 *iii. Misrepresentation*

25 Wells Fargo does not specify whether it intended its fourth claim for “misrepresentation”
26 to be pleaded as fraudulent misrepresentation or negligent misrepresentation. (ECF No. 1).
27 However, in Nevada, “[t]he nature of the claim, not its label, determines what statute of
28 limitations applies.” *Perry v. Terrible Herbst, Inc.*, 383 P.3d 257, 260 (Nev. 2016).

1 Wells Fargo alleges in its complaint that “[d]efendants failed to exercise reasonable care
2 or competence in communicating the information within the provisions of the CC&Rs . . .
3 including without limitation, the Mortgagee Protection Clause. . .” (ECF No. 1 at 13). This
4 “reasonable care” language satisfies one of the required elements for a claim of negligent
5 misrepresentation under Nevada law. *Barmettler v. Reno Air, Inc.*, 114 Nev. 441 (1998).

6 Therefore, the court will construe Wells Fargo’s fourth claim as one for negligent
7 misrepresentation and apply the three-year statute of limitations for such actions pursuant to
8 NRS 11.190(3)(d). Accordingly, Wells Fargo’s fourth claim is time-barred and will be
9 dismissed.

10 *iv. Breach of the covenant of good faith and fair dealing*

11 Wells Fargo’s fifth claim for breach of the covenant of good faith and fair dealing is
12 governed by the four-year limitations period set forth in NRS § 11.190(2)(c). *See Nev. Rev.*
13 *Stat. § 11.190(2)(c)* (four-year period for “[a]n action upon a contract, obligation or liability not
14 founded upon an instrument in writing). *See also Schumacher v. State Farm Fire & Cas. Co.*,
15 467 F. Supp. 2d 1090, 1094-95 (D. Nev. 2006). Therefore, Wells Fargo’s fifth claim is time-
16 barred and will be dismissed.

17 *v. Wrongful/defective foreclosure*

18 In its motion to dismiss, LJSG contends that Wells Fargo’s wrongful foreclosure claim is
19 governed by NRS 11.190(3)(a)’s three-year statute of limitations on actions based “upon a
20 liability created by statute, other than a penalty or forfeiture.” (ECF No. 16 at 4). A claim for
21 wrongful foreclosure “challenges the authority behind the foreclosure, not the foreclosure act
22 itself.” *McKnight Family, LLP v. Adept Mgmt. Servs.*, 129 Nev. 610, 616 (2013). NRS Chapter
23 116, which authorizes HOAs to enforce liens by non-judicial foreclosure, is the authority behind
24 the sale at issue here.

25 Wells Fargo’s wrongful-foreclosure claim is thus an “action upon a liability created by
26 statute,” and is therefore governed by the three-year statute of limitations set forth in NRS
27 11.190(3)(a). Therefore, Wells Fargo’s sixth claim is time-barred and will be dismissed.

28 . . .

1 **IV. Conclusion**

2 Accordingly,

3 IT IS HEREBY ORDERED, ADJUDGED, and DECREED that LJSG's motion to
4 dismiss (ECF No. 14) be, and the same hereby is, GRANTED.

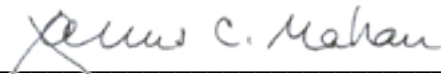
5 IT IS FURTHER ORDERED that Wells Fargo's complaint (ECF No. 1) be, and the same
6 hereby is, DISMISSED with prejudice.

7 IT IS FURTHER ORDERED that Wells Fargo's motion for leave to conduct discovery
8 (ECF No. 20) be, and the same hereby is, DENIED as moot.

9 IT IS FURTHER ORDERED that LJSG's motion for sanctions (ECF No. 15) be, and the
10 same hereby is, DENIED without prejudice.

11 The clerk of court is instructed to enter judgment accordingly and close the case

12 DATED February 22, 2019.

13 
14 UNITED STATES DISTRICT JUDGE